Supreme Court, U.S.
FILED
JAN 13 1983
ALEXANDER L. STEVAS
CLERK

82-1168

No.

IN THE

Supreme Court of the United States

October Term, 1982

FRANK ANGELO MONACO, an infant under the age of 14 years, by his parent and natural guardian, FRANK ANTHONY MONACO, DIANA LYNN MONACO and FRANK ANTHONY MONACO,

Petitioners,

against

FREDERICK S. FEINER, ALAN L. RUBENSTEIN, IRA RUBENSTEIN, FRED S. LEVINSON, E. RICHARD KINNE, individually and as co-partners in the firm of "JOHN DOE," a partnership, said name "JOHN DOE" being fictitious, true name unknown to Plaintiffs, and SATISH K. ROHATGI, ELIZABETH A. HORTON MEMORIAL HOSPITAL and MIDDLETOWN OBS-GYN ASSOCIATES, P.C.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented.

1. Whether it was a violation of due process of law by withholding from the jury all of the testimony relating to respondents' conduct in attempting to tamper with petitioners' principal witness.

2. Whether the Court below violated petitioners' right to a trial by jury by withholding from the jury all of the testimony relating to respondents' attempt to tamper with petitioners' principal witness.

3. Whether it was a violation of due process of law to conceal from the jury the respondents' acts which were violative of §215.10 of the Penal Law of the State of New York.

4. Whether it was a violation of petitioners' right to a trial by jury to conceal from the jury the respondents' acts which were violative of §215.10 of the Penal Law of the State of New York.

5. Whether it was a violation of due process of law to conceal from the jury the testimony indicating respondents' attempt to tamper with the testimony of petitioners' principal witness.

6. Whether it was violative of petitioners' right to a trial by jury to conceal from the jury the testimony indicating respondents' attempt to tamper with the testimony of petitioners' principal witness.

7. Whether it was a violation of due process of law to refuse to order a mistrial when it was disclosed that respondents had attempted to tamper with the testimony of petitioners' principal witness, and that such conduct was highly objectionable and improper, and then to preclude petitioner from disclosing to the jury all of the testimony taken revealing such incident.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982.

FRANK ANGELO MONACO, an infant under the age of 14 years, by his parent and natural guardian, Frank Anthony Monaco, DIANA LYNN MONACO and FRANK ANTHONY MONACO,

Petitioners,

against

FREDERICK S. FEINER, ALAN L. RUBENSTEIN, IRA RUBENSTEIN, FRED S. LEVINSON, E. RICHARD KINNE, individually and as co-partners in the firm of "John Doe," a partnership, said name "John Doe" being fictitious, true name unknown to Plaintiffs, and SATISH K. ROHATGI, ELIZABETH A. HORTON MEMORIAL HOSPITAL and MIDDLETOWN OBS-GYN ASSOCIATES, P.C.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK—APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT.

PETITION FOR WRIT OF CERTIORARI.

The petitioners, Frank Angelo Monaco, an infant under the age of 14 years, by his parent and natural guardian, Frank Anthony Monaco, Diana Lynn Monaco and Frank Anthony Monaco, pray that a writ of certiorari be issued to review the opinion and judgment of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, entered in the Clerk's office on the seventh day of June, 1982.

Opinions Below.

No opinion was rendered in this matter by either the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, or by the Court of Appeals of the State of New York.

Jurisdiction.

Jurisdiction is conferred on this Court by Title 28, U. S. Code, §1254. The issues herein were finally determined by the order of the Court of Appeals of the State of New York dated October 19, 1982, which refused to grant a review of the order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department made June 7, 1982. The decision of the Appellate Division above referred to and which is sought to be reviewed herein was filed on June 7, 1982.

Constitutional and Statutory Provisions Involved.

The case involves the First Section of the 14th Amendment of the Constitution of the United States which provides as follows:

> "All persons born and naturalized in the United States and subject to the jurisdiction thereof, are

> citizens of the United States and of the state in which they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor doing to any person within its jurisdiction the equal protection of the laws."

The case also involves §215.10 of the Penal Law of the State of New York which reads as follows:

> "A person is guilty of tampering with a witness when, knowing that a person is or is about to be called as a witness in an action or proceeding, (a) he wrongfully induces or attempts to induce such person to absent himself from, or otherwise to avoid or seek to avoid appearing or testifying at, such action or proceeding, or (b) he knowingly makes any false statement or practices any fraud or deceit with intent to affect the testimony of such person."

Statement of the Case.

During the course of the trial petitioners sought to have the Court declare a mistrial for the reasons set forth below, but which essentially concerned respondents' attempts during the course of the trial to tamper with the testimony of petitioners' principal witness. Following the denial, testimony concerning the events relating to this attempt to tamper was taken *in camera* outside the presence and hearing of the jury. The refusal on the part of the Court to declare a mistrial was based upon the economics of the problem of a retrial. It was concerned with the "expense to the parties" (p. 1307). After refusing a mistrial,

the Court then precluded the petitioners from allowing the jury to hear all of the evidence which related to this attempt. The refusal to allow the jury to hear what happened and make its own judgment concerning these events was serious, particularly in an action that was as hotly contested as the one at bar. Although the Court recognized the seriousness of what had taken place, and its possible impact on the jury's deliberations, it not only refused a mistrial, but refused to let the jury hear what had happened. The Court agreed that the acts were sufficiently serious so that "disciplinary action may well be in order" (p. 2549).

The matter was appealed to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department. That Court affirmed the judgment of the Court below without opinion. Applications were thereafter made to reargue and for leave to appeal to the Court of Appeals. Those applications were denied both by the Appellate Division and the Court of Appeals. The latter denial was made by order dated October 19, 1982.

Statement of Facts.

The plaintiff, Diane Monaco, entered Horton Memorial Hospital on July 15, 1974, at 3:30 a.m. The infant plaintiff, Frankie Monaco, was ultimately delivered by Cesarean section at 1:44 p.m. on the same date. Dr. Ira Rubenstein, Dr. Fred Levinson and Dr. Fred Feiner were the obstetricians who participated in the prenatal care and the delivery. Defendant Rohatgi administered DPT vaccinations to the infant plaintiff on September 14, October 14, and November 14, 1974. After the third DPT vaccination, the infant developed seizures and encephalopathy, and became blind. He was later treated for these problems

by Dr. Arnold Gold at Columbia Presbyterian Medical Center.

Plaintiffs alleged, and the testimony showed, that the infant plaintiff became blind and suffered seizures, in part, as a result of a contraindicated third injection of DPT vaccine. The injection was contraindicated because of the presence of a prolonged high fever after each of the first two injections, and because of the presence of colic and an inward deviation of one eye after the second injection. The infant also sustained brain damage because the defendant obstetricians performed a contraindicated amniotomy and unduly delayed the performance of a Cesarean section in light of the presence of cephalopelvic disproportion, failure of the infant to progress down the birth canal, the presence of meconium fluid, and dramatic changes in the fetal heart beat rate. This caused hypoxia, which contributed to the brain damage.

The action was hotly contested. The trial took approximately seven weeks. Petitioners' case contained a vast amount of testimony pointing to neglect, bad judgment, violation of accepted practice and similar facts which more than justified a judgment for the petitioners. A brief summary of what was presented is attached hereto and marked Appendix A.

The respondents refuted the petitioners' claims. Hence, a critical aspect of the case in determining success or failure with respect to either party was dependent upon the credibility of witnesses, belief of expert testimony and other conduct which might point to a recognition of where the truth rested. In this regard, the exclusion of the testimony which the petitioners sought to present to the jury was extremely serious, and was violative of the petitioners' rights to a fair trial by jury and to the conduct of

the trial in accordance with the principle of due process of law.

Petitioners' principal expert witness was a Dr. Neil Sherman. Prior to the completion of Dr. Sherman's testimony, the Court recessed for the day. When the Court reconvened the next day, plaintiffs' attorneys moved for a mistrial because of the events that transpired during the Court's recess (R. 1237, 1238). Testimony was taken concerning the events during this period. *but outside of the presence of the jury.* Specifically, plaintiffs' counsel learned through Dr. Sherman that someone called his supervisor, a Dr. Robert Morris, at New York University Hospital Medical Center (hereinafter referred to as "University Hospital" or "the hospital"), where Dr. Sherman was affiliated, in an attempt to intimidate him.

Mr. Ryan, attorney for the obstetricians, admitted that he called Dr. Morris and discussed the details of Dr. Sherman's testimony with him, even though he knew that his testimony was not yet complete. Mr. Ryan conceded that he knew that Dr. Morris was a supervisor in the obstetrical department, and that one of his clients, the defendant, Dr. Feiner, also called Dr. Morris and discussed with him the details of the case and Dr. Sherman's testimony (R. 1241, 1243).

The Court conducted an *in camera* hearing regarding these attempts to influence Dr. Sherman's testimony. Dr. Sherman testified that Dr. Morris was the Director of Obstetrics and spoke to him with a raised voice and a belligerent, critical attitude. Dr. Morris stated that he [Sherman] used "poor judgment in not consulting with him before testifying," and that he "would bring this fact

to the attention of Dr. Gordon Watkins Douglas," Chairman of the Department at the hospital. Morris told Sherman that the testimony "hung two doctors and is going to cost them a boodle." Sherman clearly felt that his affiliation with the hospital and his hospital privileges would be jeopardized (R. 1258); that there would be "flak" and potential jeopardy (R. 1252, 1277).

Still outside the presence of the jury, Dr. Feiner then testified that he called Dr. Morris at about 9 a.m. on Wednesday, January 24th, after speaking to Mr. Ryan. Dr. Feiner told Morris that he would not "involve him" [Morris] or two other doctors he spoke with at the hospital, because he was "concerned about the implications of *revealing their names.*" Feiner testified that he discussed Dr. Sherman's testimony and his fee with one of the unidentified doctors he spoke with. Dr. Feiner told Mr. Ryan about his conversation with one of these *unidentified doctors* and asked his wife to call another doctor on the hospital staff without telling Mr. Ryan about this. Dr. Feiner then spoke to this other *unidentified doctor* and discussed Dr. Sherman's fee. According to Dr. Feiner, this second unidentified doctor responded to what Dr. Feiner said by calling Sherman something like a "son of a bitch" (R. 1279, 1293).

After speaking to the *two unidentified doctors,* Dr. Feiner called Dr. Morris and told him that the conversation was "off the record, just between us." Dr. Feiner told Dr. Morris that he thought that he and his associates were "being lynched," and that he wanted to find out what kind of man would testify that he and his associates departed from accepted practice. Dr. Feiner also discussed Dr. Sherman's fee with Dr. Morris. Dr. Morris responded by stating that he was sorry that Dr. Douglas was not

available because he felt that he [Morris] was not in a position to "do anything" relative to the testimony, implying that Douglas could do so by stating that "Douglas would be *interested* in the testimony" (R. 1295, 1298). (Italics briefer's.)

After this telephone conversation with Dr. Morris, Dr. Feiner then called Dr. Douglas' office to find out where Douglas was in order to get in touch with him (R. 1299).

To further heighten the mystery and to exacerbate the injury already sustained by what transpired, it appears that Dr. Feiner, as indicated, had spoken to other physicians whom he did not identify and whose names were not revealed because of Dr. Feiner's concern about implicating these other doctors.

The Court denied plaintiffs' application for a mistrial in part to "avoid substantial disruption of the trial" and because of the "expense to the parties" (R. 1307).

After Dr. Feiner and his attorney tampered with Dr. Sherman's testimony, Dr. Sherman when recalled to the stand repeatedly qualified his testimony and diluted the effect of it by stating that he was not speaking for the "standards of the other physicians at University Hospital" (R. 1326, 1335, 1336). Attorney Ryan repeatedly sought these responses by asking what Dr. Sherman "learned about the practices of other doctors" at University Hospital and as to what was the practice of the Director of Obstetrics at University Hospital (R. 1326, 1327, 1377, 1378). The Court, over objection, allowed Dr. Sherman to answer questions about the practice of the Director of Obstetrics (R. 1328).

On cross examination, and after the complained-of attempt at tampering, Dr. Sherman modified his position considerably. He conceded that the failure to do a Ceasarean section after 7:20 or 7:30 did not cause fetal distress as, in his opinion, it had already occurred (R. 1423, 1424). He also "admitted" that a failure to use a fetal monitor did not cause the distress which he claims occurred (R. 1420). Although there were two later incidents of green-tinged fluid, the witness could not say if there were any further incidents of fetal distress (R. 1232, 1233, 1423, 1449, 1450).

Dr. Sherman acknowledged that there was no fetal distress at the time of delivery (R. 1405, 1406). In spite of this watering down of Dr. Sherman's testimony, the Court refused to let the jury hear what had transpired and all of the events relating to the conversations of the respondent Feiner, respondents' attorney, etc., with superiors of Dr. Sherman and the other members of his staff at his hospital.

Both defendant Feiner and his attorney, Mr. Ryan, attempted to and did in fact tamper with Dr. Sherman's testimony.

Both Dr. Feiner and Mr. Ryan called Dr. Morris, Dr. Sherman's superior at University Hospital. Dr. Feiner told Mr. Ryan that he would call Dr. Morris, even though Mr. Ryan had already spoken to Morris. Two other doctors were also spoken to. This was an obvious attempt to exert pressure on Dr. Sherman outside the Court to change or recant his testimony. He was referred to as "a son of a bitch" by one doctor provoked by the respondent Feiner. Dr. Sherman was in fact placed under pressure and was threatened that the matter would be referred to the Chairman of the Department of the hospital. Furthermore, Dr.

Feiner discussed not only the substance of Dr. Sherman's testimony, but also discussed the fee he was charging. He said that Dr. Sherman was trying to "lynch" his associates. Dr. Feiner called not only one, but three physicians on the hospital staff regarding Sherman's testimony as well as his fee. The inferences are strong that Dr. Sherman was to be punished for his testimony against a physician.

Dr. Feiner knew his actions were improper because he told Dr. Morris that the conversation was off the record, and was, because of the implications of the conversation, "just between the two of them." Obviously, Feiner did not want anyone to learn that he had called. Dr. Morris, accordingly, refused to disclose the name of his "informant."

Dr. Feiner clearly tried "to do" something about Sherman's testimony. When Dr. Morris told him that he could not do anything, "but that Dr. Douglas (Chairman of the Department) would be interested," Feiner then promptly tried to communicate with Dr. Douglas.

Finally, the attempts to threaten Dr. Sherman were, in fact, successful. Dr. Sherman stated under oath that he was worried about the repercussions of his testimony. His testimony was clearly affected. He repeatedly stated that he was speaking only for himself and not for the hospital, and that he could not speak for other people in his department. The impact of his testimony was obviously diluted, if not negated. It must have had an adverse effect upon the plaintiffs' case.

The respondents attempted to soften the effect of what had transpired by urging that all that they were trying to

do was to "check" the testimony of Sherman concerning his qualifications. They urged they were not attempting to tamper with or affect the witness' testimony. Of course, in reading the testimony as to what transpired, one can hardly believe that this was a routine and properly conducted investigation as to the honesty of Dr. Sherman and his testimony. The language that was utilized by the parties, the statements that were made, clearly indicate something more than an attempt to verify Dr. Sherman's qualifications. One can hardly believe anything other than that they were exerting pressure on the doctor not to testify or, if he did, that he would have to modify what he had said and what he was going to say. Even if the petitioners were wrong in the interpretation to be placed upon such testimony, it was the *jury* that should make the determination whether this was an innocent investigation concerning Dr. Sherman's qualifications or whether it was an out and out offense, violating every principle of law and the constitutional safeguards relating to a trial by jury. The latter had the right to hear what took place to determine whether there was an attempt to tamper, or whether it was an innocent check upon Dr. Sherman's veracity. To withhold this testimony from the jury was a clear violation of due process of law. It was not for the Court to decide whether the jury should hear what happened. Not only was a new trial denied, but the jury was prevented from hearing the events to make its own decision regarding them.

The respondents' attempt to discredit Dr. Sherman in that he testified that he is "on the faculty of New York University School of Medicine." The criticism is leveled against him because he thereafter was asked whether he had a teaching assignment and he said he did not:

> "I stated I was on the faculty of the medical school * * *."

And then:

> "I did not state that I did [have a teaching assignment] *at present.*" (Italics briefer's.)

The writer is at a loss to understand how this testimony would justify the acts that took place. One has to really stretch one's thinking to agree that tampering with the witness was proper because this made possible the "correction" of the witness' testimony to the effect that he didn't have a *present* teaching assignment. Sheer nonsense!!!

What was said with respect to the respondents' supposed desire to check Dr. Sherman's qualifications applies also to the respondents' claims that they were attempting to ascertain how many deliveries he did have, urging that he had exaggerated the number of deliveries that he took credit for. Even assuming that all of this was true, the conversations that took place don't point to this kind of an "investigation." But if it is true, it was the jury that had to make that decision, and the petitioners should not have been deprived of that right to a trial by jury as to any issue in the case.

Attempts to tamper with the testimony of an adverse witness creates an inference of liability.

> *Hoag vs. Wright,* 174 N. Y. 36, 46;
> *Nowack vs. Metropolitan St. Ry. Co.,* 166 N. Y. 433;
> *People vs. Shilitano,* 218 N. Y. 161.

In the *Hoag* case, *supra,* the Court of Appeals said:

> "Relations which a witness has to the case, or to a party, threats made by him, the fact that a party tried to bribe him, the fabrication, destruction or concealment of evidence and the like, may be shown."

The *Shilitano* case, *supra,* emphasized the doctrine:

> "The action of the defendant's brother and his attorney in dealing with the witnesses is indicative of an effort to coerce witnesses and suppress evidence against the defendant. That such efforts may have some tendency to prove a consciousness of guilt seems to be a fair deduction, and, therefore, they were properly admitted in evidence."

The *Nowack* case, *supra,* held that proof of tampering with a witness could be introduced into evidence against a corporation where the corporation's agent engaged in the act, even though the agent was not expressly authorized to perform the act.

Evidence of the defendant's conduct after the events relating to malpractice in attempting to suppress adverse testimony, by exerting pressure on a witness, is evidence of a consciousness of liability. It may be considered by the jury as an admission by conduct.

If the effort to suppress evidence is admissible against a witness, it should certainly be admissible against a party. Dr. Feiner was clearly acting for himself and his associates.

Additionally, the defendant's conduct was clearly a "bad act" directly relevant to the issues in the trial, and was thus admissible for this reason, if for none other. The Court itself said that disciplinary measures might be appropriate.

Section 215.10 of the Penal Law states as follows:

> "A person is guilty of tampering with a witness when, knowing that a person is or is about to be called as a witness in an action or proceeding, (a) he wrongfully induces or attempts to induce such person to absent himself from, or otherwise to avoid or seek to avoid appearing or testifying at, such action or proceeding, or (b) he knowingly makes any false statement or practices any fraud or deceit with intent to affect the testimony of such person."

Tampering with a witness is a Class A misdemeanor. It is not necessary that the individual actually succeed in dissuading a witness from appearing at trial to constitute a crime. The conduct prohibited by the statute is broader than that.

> *People vs. Leonard,* 24 Misc. 2d 300, 197 N. Y. S. 2d 209 (1960).

Certainly, there was sufficient evidence for a jury to conclude that Dr. Feiner had attempted to suppress Dr. Sherman's testimony, or that he had made a false statement in an effort to exert pressure on him by his superiors.

It was also admissible against the witness involved for the purpose of impeaching him.

Richardson, Law of Evidence, §493 (1973).

The author of this work pointed out that one of the major methods of impeaching the credibility of an opponent's witness is by:

> "* * * interrogating him on cross-examination concerning any immoral, vicious or criminal act of his life which may affect his character and tend to show that he is not worthy of belief."

Furthermore, the witness may be asked:

> "* * * whether he had previously * * * engaged in a nefarious, though perhaps not criminal, occupation."

He may be interrogated on cross examination to any—

> "* * * criminal act committed by him even though he was never convicted of the crime or even formally charged with it."

Richardson, supra, §498.

Regardless of whether the conduct was "criminal," or constituted an "admission by conduct," it was clearly reprehensible. It should not be condoned even if the overwhelming weight of the evidence were in favor of the party who engaged in this nefarious conduct. It should certainly not be condoned where, as here, the issues were hotly contested. Condoning such actions is tantamount to sanctioning them. It is particularly dangerous in an environment where it is difficult enough for injured parties to obtain

the services of physicians to testify as to malpractice committed by their peers. *McDermott vs. Manhattan Eye, Ear & Nose Hosp.*, 15 N. Y. 2d 20, 27, 255 N. Y. S. 2d 65, 71 (1964).

In any event, it was improper to prevent the plaintiff from enlightening the jury as to all of the events surrounding this incident. The issues in the case were very sharp. Credibility of the witnesses was most important. The conclusion that the juror might reach and the inferences they could draw provided the setting as to which side of the boundary line between plaintiffs' success or failure the jury could accept. It was reversible error to have excluded testimony as to everything that happened in relation to the attempt to influence a witness.

The events that transpired clearly tainted the information supplied to the jury, and a refusal to grant a mistrial deprived the petitioners of their right to a trial in accordance with the requirements of due process of law. The right was additionally denied when the Court refused to permit the jury to hear the testimony of the witnesses concerning the tampering incident. Such testimony before the Court alone deprived the petitioners of their right to have the jury determine whether there was in fact tampering, or an attempt to tamper, or whether in any event the conduct of the respondents was such from which one could draw the conclusion that the respondents recognized their guilt and responsibility for what occurred.

Finally, in preventing all of this relevant information from being considered by the jury, a substantial portion of plaintiffs' right to a trial by jury was destroyed. Petitioners no longer had a full trial of their grievances before the jury as provided for by the Constitution.

WHEREFORE, petitioners respectfully pray that a writ of certiorari be granted to review the events complained of and the determination of the Court below.

Dated: Middletown, New York
December 1, 1982

Respectfully submitted,

MICHAEL M. PLATZMAN
Attorney for Petitioners